

"On the question whether Kololiva was sold under the distinctive name of another article, a certified food color, the evidence was conflicting and I find that it was not so sold.

"In the case against Kleckner's Olivaromol, the libel states in substance that Olivaromol is adulterated in violation of Section 7 of the Food and Drugs Act in that it contains an added poisonous and deleterious ingredient, lead, which may render it harmful to health. It is alleged further that the article is misbranded in violation of Section 8 of the Food and Drugs Act, in that the name 'Olivaromol' appearing upon the label is false and misleading and tends to deceive and mislead the purchaser in that it creates the impression that the article is a flavor derived from olives or olive oil.

"Olivaromol contains coconut oil, certain ethers, a yellow color (AB color) certified by the Department of Agriculture, and an amount of chlorophyll. It is not, as such, intended for human consumption, but it is a flavoring only. As stipulated, Olivaromol contains 94 parts of lead to 1,000,000 parts of the total product. This product finds its way into the edible oil designed for human consumption in substantially the same proportions as in the case of Kololiva.

"The amount of lead which, through the medium of Olivaromol and Kololiva, reaches the final product is so insignificant as, on the basis of the testimony of the libellant's expert, almost require a finding that neither of the claimant's products contained a sufficient quantity of lead to render the ultimate article possibly harmful to health.

"It is true that the claimant's trade mark covers the word 'Oleveromol,' and that the label on the can seized had on it the word 'Olivaromol.' The label, however, was an old one, and I am satisfied it was used by mistake. See *United States v. S. Gumpert et al.*, (C. C. New York), White & Gate's book on the Food and Drugs Act, page 182.

"What has been said as to the alleged charge of a misbranding in connection with Kololiva applies in the main to Olivaromol. The libellant has not sustained the burden of showing a misbranding within the meaning of the Food and Drugs Act.

"In each case the libellant's motion for judgment is denied.

"The claimant moves for judgment and for costs. In each case a judgment or decree is to be entered denying condemnation and directing the return of the seized article by the marshal to the claimant, but upon the authority of *United States v. French Sardine Company, Inc.*, 80 Fed. (2nd) 325, that portion of the claimant's motions for judgment seeking the assessment of costs against the United States is denied."

On October 18, 1938, judgment was entered ordering that the libels be dismissed and that the products be returned to the claimant.

M. L. WILSON, Acting Secretary of Agriculture.

29677. Adulteration and misbranding of cheese. U. S. v. 80 Cases, 35 Cases, and 35 Cases of Creamed Old English Cheese. Tried to the court. Judgment for the Government. Decrees of condemnation and destruction. (F. & D. Nos. 37654, 37705. Sample Nos. 63223-B, 63270-B, 63271-B.)

This product contained added red pepper.

On April 25 and May 2, 1936, the United States attorney for the District of Minnesota, acting upon reports by the Secretary of Agriculture, filed in the district court libels praying seizure and condemnation of 150 cases, each containing 60 half-pound packages of cheese, at Minneapolis, Minn.; alleging that the article had been shipped in interstate commerce, within the period from on or about April 9, 1936, to on or about April 23, 1936, by the Kraft-Phenix Cheese Corporation from Green Bay, Wis.; and charging adulteration and misbranding in violation of the Food and Drugs Act. The article was labeled in part: "Creamed Old English Cheese."

Adulteration was alleged in that cheese containing added red pepper had been mixed and packed with the article so as to reduce or lower its quality or strength; in that cheese containing added red pepper had been substituted in whole or in part for the article; and in that it was mixed in a manner whereby inferiority was concealed.

Misbranding was alleged in that the statements on the label, "Old English Cheese * * * Sharp, Aged Cheese Pasteurized with added cream * * * The Choice of the Cheese Connoisseur * * * with a bit of tingle on the tongue * * * rare, sharp, old Cheddar, unmistakably," were false and misleading and tended to deceive and mislead the purchaser when applied to cheese containing added red pepper.

On June 9, 1936, the Kraft-Phenix Cheese Corporation entered an appearance and filed a claim and answer denying the adulteration and misbranding charges. A jury having been waived, the cases were consolidated and tried to the court on November 19 and 20, 1937 and were argued November 30, 1937. On January 17, 1938, findings of fact and conclusions of law in favor of the Government were filed with the following memorandum made a part thereof:

(NORDBYE, *District Judge*) "These three cases all involve the seizure by the Government of certain packages of creamed Old English cheese at the warehouses of the Kraft-Phenix Cheese Corporation in the city of Minneapolis, Minn. The cases were tried on November 19 and 20, 1937, and arguments were heard on November 30, 1937.

"It is conceded that the cheese was shipped in interstate commerce and at the time of seizure, it remained in the original unbroken packages in possession of the claimant. It is also conceded that at the time this product was manufactured, the following formula was used: 220 pounds of cheese; 100 pounds 30 percent of sweet cream; 3 pounds of salt; and 1 ounce of Cayenne pepper.

"The Government contends that the seizure was justified by reason of the addition of the Cayenne pepper; first, that this addition constitutes adulteration; and second, that the package is misbranded in that it would lead one to believe that the cheese contained therein is free from Cayenne pepper.

"Cheddar cheese originated in England; and the word 'Cheddar' comes from the town in England called Cheddar, where presumably this type of cheese originated. Cheddar cheese is now a very common American product and is in fact synonymous with American cheese. It appears from the testimony that in the manufacture of creamed Old English cheese, the Kraft people purchase Cheddar cheese from various markets, then age it in their storage rooms, and after it has become sufficiently aged, it is ground, pasteurized, cream is added, and an ounce of Cayenne pepper is introduced as indicated by the above formula. The product, therefore, is a cooked cheese. The amount of the red pepper that is found in the one-half pound packages, which is the weight of the product that is sold to the trade, amounts to about one thirty-second of a teaspoonful. It does not appear clearly from the testimony just when Kraft began to add Cayenne pepper in the manufacture of this cheese. The seizure was made in 1936, and undoubtedly the pepper had been an ingredient for some years. Whether creamed Old English cheese contained pepper when it was first placed on the market does not appear from the testimony. It is fair to assume that the only purpose in adding the Cayenne pepper was on the assumption that it would accentuate the sharpness of the cheese, so that the customary and normal tingle of old Cheddar would be simulated. When the seizure was made, the Kraft company determined to eliminate the pepper, and now the Old English cheese is manufactured without that spice. The contention is made that one cannot detect the difference between the cheese which contains pepper and the cheese without. One of the claimant's own witnesses, however, seemed to detect some difference and said that after the cheese containing pepper had been swallowed, there was a slight burning sensation in the back of the throat, which did not appear after eating old Cheddar.

"There was some testimony introduced that the claimant utilized the red pepper so that it might disguise the use of young cheese; that is, old Cheddar must be sufficiently aged to bring out the flavor and other characteristics, and that if young cheese could be used with old cheese, there would be a saving in the cost because normally old cheese will cost more than young, unripe cheese. However, this assumption on the part of the Government witness was largely overcome by the direct and positive testimony of the claimant that it at no time has ever used a young cheese in the manufacture of Old English, and the probabilities are that the manager of the Kraft plant took it upon himself to add the Cayenne pepper thinking it would simulate the peculiar tingle and sharpness for which old Cheddar cheese is noted. It may be entirely probable that the pasteurization in the cooking of the cheese may reduce somewhat the flavor that is found in the natural cheese, and it was assumed that the addition of the pepper would produce a flavor similar to that found in the raw product.

"On this showing, can it be held that the addition of Cayenne pepper constitutes adulteration within the meaning of the act? The act provides (Title 21 USCA Sec. 8):

For the purposes of sections 1 to 15 inclusive, of this title, an article shall be deemed to be adulterated; * * *

In the case of food: * * * Substitutes.—Second. If any substance has been substituted wholly or in part for the article.

"Red pepper is not harmful or deleterious to the health when used as a seasoning. Many wholesome products have Cayenne pepper as an ingredient without harm to the user. The Government has not sustained its contention that young Cheddar cheese was used, and that the pepper was added to disguise that fact. Manifestly, however, the claimant added the pepper for some purpose. It did not intend to market a cheese and assume that the public would understand that its flavor was at least partially due to the addition of red pepper. It scrupulously refrained from indicating to its customers that any such ingredient was contained in the cheese. It intended the public to believe that it was purchasing an old Cheddar cheese pasteurized with cream added,—nothing else. The article, old Cheddar cheese, has a definite flavor. It leaves a tingle on the tongue, and the claimant substituted in part red pepper for that portion of the cheese which normally imparts that flavor. Such must have been the intent of the claimant, and clearly that was the result. Cheddar cheese does not contain pepper, and in view of the label and descriptive matter contained on the package, the article was sold to the public and presumably purchased by it under the assumption that the package contained nothing but that which was stated thereon. While the court does not find that the article has been necessarily reduced or lowered in strength by the addition of the pepper, nor that any inferiority was concealed thereby, nevertheless, it seems impelling that the addition of the pepper tended to simulate the sharp flavor of natural Cheddar cheese, and that the accentuation of this flavor by the red pepper was intended to lead the public to believe that this sharp, biting taste was in fact the flavor normally associated with aged Cheddar. While experts might be able to distinguish the pepper and thus not be deceived, the ordinary person might well assume that the slight burning sensation is due to the natural age and sharpness of the cheese, rather than to the substitution which is present.

"That the cheese is misbranded in violation of the Food and Drugs Act seems reasonably clear. Notwithstanding that well-known cheeses may contain condiments, and that such a definition of cheese is recognized by the bulletins of the Department of Agriculture, it is conceded that Cheddar cheese never contains pepper. The average, normal person in reading the entire label on the package in which the cheese is contained, would assume—and have the right to assume—that the product contained therein consisted only of Cheddar cheese pasteurized with cream added. Cheddar cheese manufactured in England never contains pepper, and it is significant that the claimant markets another cheese, and did market this cheese during the times referred to herein, under the name of 'Old English Cheese.' This cheese was not a cooked cheese, however, but apparently consisted of ground Cheddar cheese cold-packed in jars. This 'Old English Cheese' does not contain any condiment, and there is nothing to distinguish the distinctive label 'Old English Cheese' used in the marketing of these two cheeses, except that one is a pasteurized, cooked Cheddar cheese, and the other is a natural Cheddar cheese prepared in the manner above indicated.

"It cannot be urged that any misbranding arises on account of the use of the term 'Old English,' in that it fairly appears that the product is manufactured in the United States by the claimant, but it is idle to contend that because some well-known cheeses contain pepper, the claimant can market this cheese, the package or label of which clearly leads the public to believe that it contains nothing but Cheddar cheese with cream added and not be chargeable with misbranding, if instead of being composed solely of Cheddar cheese and cream, it contains the added ingredient of Cayenne pepper. As before stated, it must be recognized that the pepper was added for only one purpose and that was to simulate the flavor of the best aged Cheddar cheese. It was not added so as to provide a distinctive flavor, such as occurs in well-known cheeses where spices and condiments have been added. There is no showing that the public by long usage have known that cheeses marketed by the claimant under the brand 'Old English' contain some spice or condiment. In fact, just the contrary appears because of the apparent secrecy regarding the use of any seasoning. Certainly, it may be reasoned that the label would deceive a person of ordinary prudence, and this is strikingly supported by the fact that this result was intended by the claimant.

"The fact that a comparatively small amount of seasoning was used is no defense. The same situation would exist if, instead of $\frac{1}{32}$ of a teaspoonful of red pepper being added to $\frac{1}{2}$ pound, the claimant had added a tablespoonful to the same quantity. While such a product would probably be unpalatable to most people, claimant's arguments would be just as sound if under such circumstances it intended that, by reason of the distinctive label and information

contained thereon, it would not be required to inform the public of the pepper that was added. Nor can the claimant be absolved from the restrictions of the act because it uses a distinctive name in marketing this product. It will be observed that the act specifically provides with reference to the use of distinctive names that it 'Shall not lead the purchaser to suppose that the product is other than it is.'

"The court has given a liberal construction to the act, both in regard to the provisions of adulteration and misbranding. It may be that the situation presented is not particularly aggravated in that the adulteration does not consist of a harmful ingredient, but in considering the purposes of the statute, it would seem that the Government's contentions must be sustained. One may observe in passing that to some persons red pepper may have a deleterious effect, particularly in that they may have an allergy for that substance. But whether the adulteration is harmful or not, the purchaser, in view of all the circumstances, is entitled to know whether he is obtaining pure Cheddar cheese, as the label indicates, or Cheddar cheese with an adulterated flavor.

"Let this memorandum be made a part of the foregoing findings of fact and conclusions of law."

On February 5, 1938, the product having deteriorated so as to be valueless, judgments were entered ordering its destruction. The claimant noted an appeal from the judgment but by agreement the appeal was abandoned and was formally dismissed on September 13, 1938.

M. L. WILSON, *Acting Secretary of Agriculture.*

29678. Adulteration of candy. U. S. v. 10 Cartons of Candy. Default decree of condemnation and destruction. (F. & D. No. 43669. Sample No. 23785-D.)

This product having been shipped in interstate commerce and remaining unsold and in the original packages, was at the time of examination found to be insect-infested.

On September 6, 1938, the United States attorney for the Eastern District of Louisiana, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 10 cartons of candy at Thibodaux, La.; alleging that the article had been shipped in interstate commerce on or about May 5, 1938, by Bradas & Gheens, Inc., from Louisville, Ky.; and charging adulteration in violation of the Food and Drugs Act.

It was alleged to be adulterated in that it consisted wholly or in part of a filthy vegetable substance.

On November 8, 1938, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

M. L. WILSON, *Acting Secretary of Agriculture.*

29679. Adulteration of candy. U. S. v. 32 Boxes of Candy. Default decree of condemnation and destruction. (F. & D. No. 43683. Sample No. 23784-D.)

This product having been shipped in interstate commerce and remaining unsold and in the original packages, was at the time of examination found to be insect-infested.

On September 8, 1938, the United States attorney for the Eastern District of Louisiana, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 32 boxes of candy at Houma, La.; alleging that the article had been shipped in interstate commerce on or about February 7 and 24, 1938, by Bennett-Hubbard Candy Co. from Chattanooga, Tenn.; and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: "Cumberland Mt. Choc. Cream Drops."

The article was alleged to be adulterated in that it consisted wholly or in part of a filthy vegetable substance.

On November 9, 1938, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

M. L. WILSON, *Acting Secretary of Agriculture.*

29680. Adulteration of candy. U. S. v. 8 Boxes of Candy. Default decree of condemnation and destruction. (F. & D. No. 43598. Sample No. 37706-D.)

This product having been shipped in interstate commerce and remaining unsold and in the original packages, was at the time of examination found to be insect-infested.

On September 6, 1938, the United States attorney for the Eastern District of Louisiana, acting upon a report by the Secretary of Agriculture, filed in the